FREDERICK H. LARSON
v.
STATE OF UTAH

IBLA 75-595 Decided October 22, 1980

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., declaring eight oil shale placer mining claims null and void.

Set aside and remanded.

1. Mining Claims: Discovery: Marketability--Mining Claims: Marketability--Oil Shale: Mining Claims

   The Supreme Court has determined that a finding of present marketability as of Feb. 25, 1920, is not a prerequisite to a determination that oil shale deposits are valuable mineral deposits within the meaning of the general mining laws, and has excepted oil shale claims from the general rules of discovery for mining claims.

2. School Lands: Grants of Land--School Lands: Mineral Lands

   Title to certain designated school sections granted to the State of Utah under the Act of July 16, 1894, vested as of the date of acceptance of the official survey of those sections following statehood if the lands were not known to be mineral at that time. Whether the lands were known to be mineral is a question of fact and this contest must be remanded for the hearing of evidence on that issue.

3. Evidence: Presumptions--Rules of Practice: Appeals: Timely Filing

   There is a legal presumption of regularity which supports the official acts of public

officers and the proper discharge of their official duties. Where the record reveals no conclusive evidence that an appeal was filed timely, but the responsible official has referenced in correspondence that the appeal was timely, the presumption of administrative regularity will attach and the appeal considered as timely filed.

4. Administrative Authority: Laches--Estoppel--Laches

The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

5. Administrative Authority: Generally--Board of Land Appeals--Secretary of the Interior

As the Department's final review authority on decisions relating to the public lands, the Board of Land Appeals exercises all the powers which the Department would have in making an initial decision.

APPEARANCES: Kent R. Olson, Esq., Gulf Energy and Minerals Co., for appellants; Paul E. Reimann, Assistant Attorney General, for the State of Utah; Reid W. Nielson, Assistant Regional Solicitor, for the United States.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Pursuant to the Act of June 21, 1934, 48 Stat. 1185, 43 U.S.C. § 871(a) (1970), repealed by section 705(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792, the State of Utah filed application U-081587 for a confirmatory patent to the lands in secs. 2 and 32, T. 10 S., R. 25 E., Salt Lake meridian. The application was made to confirm that these land sections passed to the State of Utah under its grant of certain sections in support of its common schools.

BLM published public notice of the application on January 16, 1964, requiring anyone objecting to the patent issuance to file a protest with BLM. In response, Frederick H. Larson filed a protest and requested that the patent be denied because he was successor-in-interest to eight valid oil shale placer mining claims covering the lands. BLM then instructed Larson to initiate a private contest

against the State or waive the rights asserted in his protest. On April 18, 1964, Larson filed a contest complaint to which the State timely responded, and a hearing was scheduled before Administrative Law Judge John R. Rampton, Jr. (At that time, his title was "Hearing Examiner." Our reference is to his present title.) At a prehearing conference, the parties agreed to stipulate as to the relevant facts, waiving a hearing of oral testimony.

The stipulations of fact as reported in Judge Rampton's decision were as follows:

1. The entries in conflict with application U-081587 of the State of Utah for confirmatory patent under the Act of June 21, 1934 (43 U.S.C. 871a) are oil shale placer mining claims identified and described below:

Name of Claim	Location Date	Lands in T.10 S., R.25 E.
Hell Hole No. 45	2-22-19	Section 2, W 1/2 W 1/2
Hell Hole No. 46	2-22-19	Section 2, E 1/2 W 1/2
Hell Hole No. 47	2-22-19	Section 2, W 1/2 E 1/2
Hell Hole No. 48	2-22-19	Section 2, E 1/2 E 1/2
Raven Dome No. 3	2-22-19	Section 32, W 1/2 W 1/2
Raven Dome No. 4	2-22-19	Section 32, E 1/2 W 1/2
Raven Dome No. 5	2-22-19	Section 32, W 1/2 E 1/2
Raven Dome No. 6	2-22-19	Section 32, E 1/2 E 1/2

2. Except for conflicts with prior valid claims or other entries, title to sections 2 and 32, T. 10 S., R. 25 E., Salt Lake meridian, would have vested in the State of Utah under the act extending grants in aid of schools to mineral lands (43 U.S.C. 870), the effective date of which was January 25, 1927.

3. Oil shale beds are known to occur upon all of the subject lands. The oil shale beds outcrop upon and extend beneath the subject lands, dipping northwest at 3 to 4 degrees. The oil shale beds are contained within the Parachute Creek member (Upper Marly Member) of the Green River formation and the oil saturation within a zone or bed is relatively constant laterally over great distances (UG&MS Report, pages 2 and 3).

4. Overburden on the oil shale deposits in the Hell Hole Nos. 45 to 48 claims varies from 0 to 15 feet; on the Raven Dome Nos. 3 to 6 claims up to 130 feet (UG&MS Report, page 3).

5. Thickness of oil shale zones on the subject claims is:

Claims	45 gal/ton zone	30 gal/ton zone
Hell Hole #45-48	2.0 feet	23 feet
Raven Dome #3-6	7.5 feet	20 feet

Claims	25 gal/ton zone	15 gal/ton zone
Hell Hole #45-48	25 feet	85 feet
Raven Dome #3-6	25 feet	85 feet

(UG&MS Report, page 3)

6. Estimated total volume of oil yield from the Hell Hole Nos. 45 to 48 claims is 55,000,000 barrels (42 gals/bbl.), and from the Raven Dome Nos. 3 to 6 claims, 111,000,000 barrels, or a total from both groups of claims of 166,000,000 barrels. This volume is represented by and derived from an average thickness of 126 feet of oil shale throughout the two sections (2 and 32) having a grade of 15 gallons per ton or better (UG&MS Report, page 3).

7. There is no present commercial production of oil shale or oil from oil shale within the subject claims; however, all of the subject claims have potential economic value for oil shale deposits occurring therein. Many factors besides the existence of rich oil shale affect the economics of oil shale production from the subject claims (UG&MS Report, page 4).

8. Within township 10 S., range 25 E., SLM, Utah, the official land office records show the following patents of oil shale claims:

Date of Patent	Patent Number	Acreage within T. 10 S., R. 25 E.
11-8-21	831469	1337.85 acres
7-9-23	911379	483.05 acres
4-7-24	935885	380.00 acres
3-4-27	996958	640.00 acres
3-4-27	996959	480.00 acres
3-4-27	996957	640.00 acres
6-14-27	1004007	480.00 acres
9-26-58	1186614	190.00 acres
2-10-59	1192387	640.00 acres
		5270.90 acres

(extracted from Bureau of Land Management land office records, Salt Lake City, Utah, and subject to confirmation)

> 9. Oil shale has been economically produced on a commercial basis in certain other countries during the period prior to 1927 to the present from deposits no richer or more extensive than the oil shale deposits found in the Green River formation in Colorado and Utah, and known to occur within the subject claims (i.e., oil shale containing approximately 25 gallons per ton).
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> (Exhibit 1, pages 24-25; Exhibit 4, pages 12-13; Exhibit 5, pages 12-14; Exhibit 9, pages 195-197, 202-205).

In addition, the parties submitted various exhibits containing general information on oil shale. Judge Rampton summarized general facts elicited from these exhibits and concluded as follows:

> The ultimate fact to be deducted from the stipulations and exhibits is that although in other countries oil shale has been mined economically for many, many years, the mining of oil shale in the United States has been delayed until the present time due to the abundance of oil and cheapness of producing it, both domestic and foreign, favorable tax allowance granted to oil producers, and other political and economic factors. There is no question that current mining technology is adequate for getting oil from shale and that inevitably, whether it be two, five, ten, or twenty years, the Colorado and Utah Oil shale deposits will be profitably processed for petroleum by-products.

Since the parties had stipulated that the Larson placer claims had been located prior to the date that title would have vested in Utah and no issues were raised as to abandonment of, assessment work on, or title to the claims, Judge Rampton found that the only issue for determination was whether a valid discovery had been made on the claims. In a decision dated June 6, 1967, he concluded:

> The law as applied to oil shale placer claims at the present time is expressed in the case of Freeman v. Summers, 52 L.D. 201 (1927) * * *.
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> * * * * * * *
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> Except that forty years have elapsed since the date of the Freeman decision and commercial production of oil from shale is now imminent, the facts set forth therein are comparable to those in instant case. The Raven Dome and Hell Hole claims whose validity is now in issue were properly located in 1918 and 1919 at a time when oil

> deposits could be acquired under the mining laws. Contestant has been shown to be the sole owner of the claims and the claims have been shown to contain known and virtually proven reserves conceded by contestee to be an estimated 166 million barrels of oil. These reserves outcrop naturally at the surface and have been confirmed by drilling to exist throughout the claims. The deposits, being shallow, require only the very simplest mining effort to remove the material for processing by well known methods to yield oil. The known beds of oil-bearing shale on the claims are moderately to impressively thick and contain a tested oil content significantly above the recognized economic cutoff of commercial deposits in today's oil shale technology. This evidence is amply sufficient to justify a prudent man in the further expenditure of his time and money in an effort to develop a paying mine from each of these claims.
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> Accordingly, I conclude that the Raven Dome Nos. 3, 4, 5, and 6, and the Hell Hole Nos. 45, 46, 47, and 48 placer mining claims are valid. The contestant's possessory title is superior to that of the contestee's and no confirmatory patent to the contestee may issue as to those lands occupied by the said mining claims.

The State of Utah submitted a petition for rehearing dated July 6, 1967, on the basis that it had been apprised of evidence material to the case which it could not have discovered and produced for the original hearing even with reasonable diligence. At the same time the State submitted a notice of appeal of the decision and requested a stay of the requirement of filing a statement of reasons pending the outcome of the petition for rehearing. By letter dated July 26, 1967, the Chief, BLM Office of Appeals and Hearings 1/ informed the State of Utah that, upon the filing of the notice of appeal, Judge Rampton lost jurisdiction over the case and that the petition for rehearing should be resubmitted to the Office of Appeals and Hearings with supporting materials. The time for filing a statement of reasons for appeal was stayed. When no petition for rehearing was thereafter submitted, the Chief, Office of Appeals and Hearings, on August 18, 1969, ordered that a statement of reasons be submitted on or before October 6, 1969. He indicated that the State could incorporate a showing directed to the need for rehearing in this statement, if it so desired.

1/ The BLM Office of Appeals and Hearings was abolished in 1970 when the Departmental Office of Hearings and Appeals was created. Since that time, appeals from decisions of BLM officials, as well as Departmental Administrative Law Judges, have been heard by the Board of Land Appeals of the Office of Hearings and Appeals, in the Office of the Secretary.

The State of Utah then submitted another petition for rehearing 2/ dated September 30, 1969, indicating that it had evidence as to abandonment of the Raven Dome Nos. 3-6 claims in 1930 by F. V. Larson predecessor in interest to the claims; that the State's title vested as of 1906, the date of acceptance of the survey for T. 10 S., R. 25 E., Salt Lake meridian; and that a new hearing is required to apply the marketability rule set out in United States v. Coleman, 390 U.S. 599 (1968). Larson objected to consideration of the petition. Nevertheless, by order of June 5, 1972, the Board of Land Appeals remanded the case for reopening of the hearing to permit the State an opportunity to demonstrate its superior title. Larson petitioned for reconsideration of the order on procedural grounds, but the Board reaffirmed its order.

A prehearing conference was held on January 16, 1973, at which Judge Rampton recognized the United States as intervenor and Gulf Mineral Resources Company as co-contestant with Larson. A second conference was scheduled after the following additional issues were set out by the parties: (1) whether title to the lands passed to the State of Utah on June 13, 1906, under the Act of July 16, 1894; and (2) if not, what was the effect of subsequent withdrawals. In April 1973 the parties joined in a request to further postpone the hearing to allow the parties time to agree on and enter stipulations.

On June 15, 1974, the parties orally notified Judge Rampton that they had agreed to stipulations but had not reduced them to writing. When he received no further communications, Judge Rampton directed the parties, by order dated December 23, 1974, to show cause why he should not issue a decision based on the findings and conclusions of this Board in United States v. Winegar, 16 IBLA 112, 81 I.D. 370 (1974). All parties responded.

On April 18, 1975, Judge Rampton issued the decision now on appeal holding that there was no significant distinction between the findings of fact in this case and United States v. Winegar, supra, and therefore the rule of that case controlled this case. He quoted the holding from the syllabus of Winegar as follows:

> In order for an oil shale deposit to be considered valuable within the meaning of the general mining law, it must appear as a present fact, as of February 25, 1920, and at all times thereafter, that the deposit could be developed, extracted, and marketed at a reasonable profit. The possibility of dramatic technological breakthroughs or changes in market conditions at some future date has no bearing on value as a present fact.

2/ The State indicated that the delay had occurred because the previous Attorney General had given no notice to the Attorney General taking office in January 1969 that the matter was pending.

He found that the subject placer claims must be declared null and void because stipulation No. 7 from the original hearing declared that although all claims had potential economic value for oil shale there was no present expectation in 1920 of commercial production on the claims.

Contestants Larson and Gulf Mineral Resources Co. have appealed and requested an opportunity for oral argument.

[1] At the outset, we must set aside Judge Rampton's decision presently appealed, because the Board's decision in Winegar, supra, was reversed in Andrus v. Shell Oil Co., 100 S. Ct. 1932 (1980). The Supreme Court held that oil shale deposits are valuable mineral deposits and the Government may not invalidate pre-1920 oil shale claims by imposing the present marketability requirement as of 1920 on such claims. The Court concluded that the Departmental position as enunciated in Freeman v. Summers, supra, is correct.

The Supreme Court carved out an exception to the general standards for determining whether there is a discovery of a valuable mineral deposit under the mining laws. Under the reasons given in its ruling, the Supreme Court makes oil shale mining claims different from all other mining claims in the evaluation of economic criteria to determine their value. Thus, where there is a sufficient quantity of oil shale within claims which was known prior to 1920, the claims may be upheld under the Court's ruling in Andrus v. Shell Oil Co., supra. Accordingly, that ruling governs further consideration of the mining claims in this case. These claims cannot be upheld, however, if there are other reasons for questioning their validity. These include a determination of whether title to the land had passed to the State of Utah prior to the location of the claims, and also an issue raised by the State concerning abandonment of the claims because of the claimant's alleged failure to perform assessment work.

On rehearing of Judge Rampton's 1967 decision the State of Utah argued that title to the land at issue vested in the State in 1906 pursuant to section 6 of the Act of July 16, 1894, 28 Stat. 109, rather than pursuant to the Act of January 25, 1927, 44 Stat. 1026, as earlier stipulated. 3/ Specifically the State urged that pursuant to section 6 all lands in secs. 2 and 32, T. 10 S., R. 25 E., Salt Lake meridian, excluding those known to be mineral at the time of the township survey in 1906 vested to the State as of the date of the survey. The State indicated that it had discovered evidence in the form of the

3/ The Act of July 16, 1894, supra, had been construed to grant title to lands in certain surveyed sections which were not known to be mineral for the purpose of support of common schools. The Act of January 25, 1927, supra, extended this grant to include mineral lands not otherwise appropriated as of January 25, 1927.

survey field notes indicating that the lands in those sections were considered to be non-mineral at the time of acceptance of the official survey. Judge Rampton's 1975 decision did not decide this issue since he found United States v. Winegar, supra, controlling as to the invalidity of the oil shale claims.

[2] Section 6 of the Act of July 16, 1894, supra, provided that upon admission of Utah as a state, "sections two, sixteen, thirty-two, and thirty-six in every township of said proposed State * * * are hereby granted to said state for the support of common schools * * *." Section 10 of the same Act further provided that lands granted for educational purposes "shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States." 28 Stat. 110. The Supreme Court thereafter construed this grant to be a grant of all lands except those known to be mineral when the grant took effect. United States v. Sweet, 245 U.S. 563 (1918). By long standing Departmental practice, these school land grants attached on the date of acceptance or approval of the plat of the survey of any section if such survey occurred after the date of admission of the state to the Union. 43 CFR 2621.0-2; Navajo Tribe of Indians v. State of Utah, 12 IBLA 1, 80 I.D. 441 (1973). The State of Utah has indicated that the plat of the survey of T. 10 S., R. 25 E., Salt Lake meridian, was approved on June 13, 1906. Thus the determinative issue in this contest now is whether the lands in secs. 2 and 32 were known to be mineral on June 13, 1906. If the lands were not known to be mineral on that date, title vested in the State in 1906. The lands therefore would not have been Federal public lands open to mineral location in 1919 and appellants' claims would then have to be declared null and void. If, however, the lands were known to be mineral, title could not have vested in the State until January 25, 1927, and would be subject to prior valid entries. 43 U.S.C. § 870(c) (1976).

Although we are reluctant to remand this case for a third hearing, we have no choice but to do so for submission of evidence on the above issue. On rehearing, the parties must address specifically whether the lands in secs. 2 and 32, T. 10 S., R. 25 E., Salt Lake meridian, were known to be mineral in character on June 13, 1906. We wish to point out that, until the contrary is clearly shown, there is a very strong presumption that land granted to a state for school purposes was of the character contemplated by the grant, insofar as its then known mineral or nonmineral character was concerned. Navajo Tribe of Indians v. State of Utah, supra at n.4; Margaret Scharf, 57 I.D. 348, 356-57 (1941). Thus appellants must clearly establish that secs. 2 and 32 were known to be mineral in character in 1906 in order to effectuate any change in the date title presumptively passed to the State of Utah. However, we expect that the State of Utah having originally raised this issue will submit the evidence to support its arguments that the land was considered nonmineral.

We recommend that a prehearing conference before the Administrative Law Judge be held following issuance of this opinion, with the

parties prepared to indicate whether the evidence required by this decision will be presented by stipulation or submission of documents or whether an oral hearing must be held. In addition the parties must raise other factual issue relevant to this contest, if any, so that the opposing party may have an opportunity to address the issue at hearing and this contest may be brought to a close. Except insofar as we now specifically resolve issues raised by the parties in the prior proceedings in this case, those issues may be entertained. In addition to the mineral character of the land mentioned, supra, such issues include the effect of the claimants' alleged failure to perform assessment work and the State's allegation that the claimants abandoned the claims at some time permitting passage of title to the State even if the land were found to have been known mineral in character in 1906. Guidance on the assessment and abandonment issues may be found in the Supreme Court decision in Hickel v. Oil Shale Corp., 400 U.S. 48 (1980), and the recent Board decision, United States v. Bohme, 48 IBLA 267, 87 I.D. 248 (1980).

[3] In their statement of reasons now before us, as they have throughout these contest proceedings, appellants assert various procedural deficiencies. First, they contend that the State of Utah did not timely file its notice of appeal to Judge Rampton's June 6, 1967, decision and therefore this Board lacked jurisdiction to consider an appeal or petition for rehearing. As appellants note, the record before us in this case is deficient in that original copies of some documents bearing the stamped date of receipt as well as return receipts for the June 1967 decision have been lost. Examination of correspondence in the file indicates that the State's notice of appeal was filed in the Office of the Hearing Examiner on July 7, 1967 (letter from Attorney General, State of Utah, to BLM, July 19, 1967), 31 days after the date of the decision. Although there is no conclusive evidence in the case file before us as to when the State of Utah received a copy of the decision, in a letter dated July 26, 1967, to the State, the Chief, Office of Appeals and Hearings, indicates, "We have received from the Hearing Examiner at Salt Lake City your timely notice of appeal from his decision of June 6, 1967." (Emphasis added.) There is a legal presumption of regularity which supports the official acts of public officers and the proper discharge of their official duties. Phillips Petroleum Co., 38 IBLA 344 (1976). In absence of clear evidence to the contrary, we must presume that the Chief, Office of Appeals and Hearings, properly evaluated the circumstances of the State's appeal in 1967. Although appellants have suggested circumstances where the appeal would not have been timely, we are not convinced that such is sufficient to overcome a presumption of regularity in the processing of the State's appeal.

Appellants also argue that it was an abuse of administrative discretion to (1) grant the State of Utah a stay of the requirement of filing a statement of reasons for over 2-1/4 years; (2) accept the State's second petition for rehearing when the letter of August 19,

1969, called for a statement of reasons; (3) not limit the State's second petition to the issue of newly discovered evidence; (4) remand for rehearing 5 years after the 1967 decision by Administrative Law Judge Rampton; and (5) decide this contest on rehearing on an issue extraneous to the rehearing order.

[4] It was clearly within the authority of the Office of Appeals and Hearings to grant an extension of time for filing a statement of reasons. 43 CFR 1840.0-6(g) (1967). See also 43 CFR 4.22(f). No time limit is specified in the regulations, thus, the length of any extension is dictated by circumstances and is in the discretion of the authorizing officer. Instances of delay in the adjudication of this case, while unfortunate, cannot serve to cancel this Board's responsibilities. It is well established that the authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. United States v. Maurice L. Wilson, 38 IBLA 305 (1978). 43 CFR 1810.3(a). We hope that this case can now be speedily resolved and request that on rehearing strict control of the time be maintained. We note that the delay in deciding the present appeal was due to the litigation involving United States v. Winegar, supra, which controlled the issue of discovery on the mining claims, and was decided by the Supreme Court in Andrus v. Shell Oil Co., supra.

[5] As the Department's final review authority of the initial decision, this Board exercises "all the powers which [the Department] would have in making the initial decision." 5 U.S.C. § 557(b) (1976); 43 CFR 4.1. We are not bound by erroneous stipulations of law. In this case, the parties stipulated to certain facts and legal conclusions. An Administrative Law Judge may adopt findings of fact and conclusions of law proposed by a party if correct and must rule on each in the record. 43 CFR 4.452-8(b); 43 CFR 1852.3-8(b) (1967). Where such an adoption is incorrect, as in this case, this Board has the authority to so find and to thereafter rule according to law. In addition, this Board has the authority, after considering the evidence in the record before it to remand sua sponte for further hearing if it considers such action necessary to develop facts. 43 CFR 4.452-9. See United States v. Lloyd O'Callaghan, Sr., 29 IBLA 333, n.6 (1971).

In this case the stipulation accepted by the parties and Judge Rampton that the State's title vested in 1927 was only correct if the lands were unappropriated mineral lands at that time. As already discussed, when title to school lands vests by law first depends on a question of fact as to the mineral or nonmineral character of the land when the survey of those lands was accepted under the Act of July 16, 1894, supra. As the proper conclusion of law in this case depends on an issue of fact unaddressed at the first hearing, it was within the Board's authority in 1972, as now, to remand the case for further hearing on that issue.

Finally Judge Rampton's decision did not become final once an appeal was filed, and it remains pending until a decision of this Board becomes final. It was correct for Judge Rampton to apply the then applicable and controlling law in 1975 to dispose of the case just as this Board must now apply the currently prevailing law.

Appellants have requested oral argument. In view of our disposition of this case, such argument is not warranted at this time and the request is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for further hearing consistent with this opinion.

Joan B. Thompson
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge